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Supreme Court of the United States

OCTOBER TERM, 1951.

No. 427

JOHN T. BARKER,
Plaintiff-Appellant,

vs.

C. LAWRENCE LEGGETT, Superintendent of the Insurance Department of the State of Missouri; MOUNT ETNA MORRIS, Treasurer of the State of Missouri and as a Member of the Board of Fund Commissioners; W. H. HOLMES, Auditor of the State of Missouri and as a Member of the Board of Fund Commissioners of the State of Missouri; G. H. BATES, Director of Revenue of the State of Missouri and as Secretary of the Board of Fund Commissioners of the State of Missouri; FORREST SMITH, a Member of the Board of Fund Commissioners of the State of Missouri; and J. E. TAYLOR, a Member of the Board of Fund Commissioners of the State of Missouri,
Defendants-Appellees.

APPELLANT'S BRIEF OPPOSING APPELLEES' MOTION TO DISMISS OR AFFIRM.

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Defendants-Appellees.

APPELLANT'S BRIEF OPPOSING APPELLEES' MOTION TO DISMISS OR AFFIRM.

The Plaintiff-Appellant, John T. Barker, respectfully submits the following brief opposing Respondents' Motion to Dismiss or Affirm.

THE JUDGMENT BELOW.

This is a direct appeal to this Court from the order and judgment of a Three Judge Federal Court assembled under the provisions of Title 28, U. S. C. 2281 and 2284, denying plaintiff's application for a temporary injunction against the defendants as State Officers of the State of Missouri, to enjoin said defendants from enforcing a state statute (Sec. 379.395, R. S. Mo., 1949, which appears as appendix A of this brief), claimed by plaintiff to be unconstitutional and void as impairing the obligation of his contract with the State of Missouri to render it certain legal services and to be paid therefor; depriving him of his freedom to contract; depriving him of his property without due process of law, and depriving him of the equal protection of the law, all in violation of Article I, Section 10, Paragraph 1, and of the Fourteenth Amendment to the Constitution of the United States, and also sustaining defendants' Motion to Dismiss and dismissing plaintiff's action with prejudice on the ground plaintiff's complaint failed to state a claim against defendants upon which relief could be granted.

OPINION BELOW.

The opinion of the United States District Court for the Western District of Missouri, Central Division (Sitting as a Three Judge Court pursuant to the provisions of Title 28, U. S. C., Sections 2281 and 2284), is not reported but is attached hereto as Appendix B.

THE ACTION.

This action was brought to obtain a declaratory judgment of plaintiff's right to be paid attorneys' fees for his services by defendants out of a fund in the hands of defendants which had been accumulated as a result of the efforts of plaintiff; for a preliminary restraining order, an interlocutory injunction and a final injunction against defendants paying such fund in the hands of the defendants into the general revenue funds of the state until plaintiff was paid therefrom and to compel defendants to pay plaintiff's attorney's fees out of said fund.

Plaintiff's Amended Complaint (the allegations of which were admitted by defendants' Motion to Dismiss) alleged briefly and in substance that:

Plaintiff was employed by the State of Missouri as a lawyer to bring a suit for the benefit of policyholders to recover from fire insurance companies certain premiums illegally collected; his contract, which was in writing, provided that he was to be paid a reasonable fee for his services and be reimbursed for his expenses out of said fund contingent on recovery; that he, in conjunction with certain other lawyers hired under similar contracts, performed such services resulting in the recovery of a fund of $2,751,000.00; that after all policyholders had been paid in full who could be found there remained a fund of $2,160,871.32 which was being held by the defendants; that the Supreme Court of Missouri held that plaintiff had a valid contract but could not be paid out of said fund as under the Insurance Code of Missouri such fund was a trust fund for the policyholders who must be paid in full therefrom without any deductions (*Aetna Insurance Co. v. O'Malley*, 343 Mo. 1232, 124 S. W. 2d 1164); that the Insurance Code made no provision for disposition of such

undistributable fund after all policyholders were paid in full who could be found and there was no obstacle in Missouri law to plaintiff being paid out of this undistributable surplus until thereafter the Missouri legislature passed the Escheat Act of 1941, which as construed by the Supreme Court of Missouri (*Weatherby* v. *Jackson*, 358 Mo. 542, 215 S. W. 2d 742) precluded plaintiff from being paid out of said undistributable surplus and directed him to apply to the legislature for his pay; that plaintiff made repeated applications to the legislature for his compensation without avail; that unless defendants were restrained and enjoined they would on August 9, 1951, transfer said fund to the general revenue of the State of Missouri making it more difficult if not impossible for plaintiff to be paid therefrom; that Weatherby, Cook and Lauf who had been similarly employed had been partially paid for their services out of said fund and upon being sued for its return made agreements with the State of Missouri which allowed them to retain all such payments out of said fund thereby discriminating against plaintiff; that the denial of plaintiff's right to be paid out of said fund violated his rights under the Constitution of the United States in the respects hereinafter set out.

The evidence showed that on August 31, 1951, said fund was by the defendants transferred to the general revenue funds of the State of Missouri (Transcript of Evidence pp. 14-16).

STATUTES INVOLVED.

Article I, Section 10, Paragraph 1, Constitution of the United States; Fourteenth Amendment to the Constitution of the United States; Title 28, U. S. C., Sections 1253, 2101(b), 2281, 2284; Sections 5678 and 5874, R. S. Mo., 1929; and Section 379.375, R. S. Mo., 1949.

DECISIONS SUSTAINING THE JURISDICTION OF THIS COURT ON DIRECT APPEAL.

The following decisions sustain the jurisdiction of this Court to review the order and judgment of the Three Judge Federal Court denying an interlocutory injunction against the enforcement of the state statute alleged to be unconstitutional and dismissing the Complaint with prejudice on the ground it failed to state facts upon which relief could be granted against defendants: *Rorick* v. *Board of Commissioners*, 307 U. S. 208, 59 S. Ct. 808; *Gibbs* v. *Buck*, 307 U. S. 66, 59 S. Ct. 725; *Natural Gas Pipeline Co. of America* v. *Slattery*, 302 U. S. 300, 58 S. Ct. 199; *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 68 S. Ct. 525; *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637, 70 S. Ct. 851; *Public Service Commission* v. *Brashear Freight Lines*, 306 U. S. 204, 59 S. Ct. 480; *Railroad Commission of California* v. *Pacific Gas & Electric Co.*, 302 U. S. 388, 58 S. Ct. 334; *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, 55 S. Ct. 187.

THE FEDERAL QUESTIONS INVOLVED ARE SUBSTANTIAL.

In their Statement of Grounds Making Against the Jurisdiction of this Court, Defendants-Appellees state: "This case is in the Federal Court by reason of diversity of citizenship, the plaintiff-appellant being a resident of the District of Columbia, and the state officers, who are defendants-appellees, being residents of the State of Missouri" (Appellees' Statement Making Against Jurisdiction, p. 3).

That is obviously an inadvertent statement as thereafter in the same document they recognize and discuss

briefly some of the federal questions here involved and which are also bases for the Federal Court Jurisdiction.

That such statement is not correct is readily demonstrable. We quote from paragraph 2 of the First Amended Complaint as follows:

> "Jurisdiction to hear, try and determine this cause, and to award both coercive and declaratory relief, or either, exists because of the denial of the rights of the plaintiff protected by the federal Constitution in addition to, and independently of, a jurisdiction existing because of diversity of citizenship."

Section "I" of the First Amended Complaint, paragraphs 30 to 34 inclusive set forth with particularity plaintiff's claims as to the violation of his rights under the Constitution of the United States. Federal Court jurisdiction therefore does not rest on diversity of citizenship alone but rests also on the several federal constitutional questions involved.

In the case of *Stratton* v. *St. Louis Southwestern Ry. Co.*, 282 U. S. 10, 15, 51 S. Ct. 8, it is stated (l. c. 10):

> "The statute applies only where there is a substantial claim of invalidity under the Federal Constitution and where an application for an interlocutory injunction, for the purposes contemplated by the statute, is made and pressed."

Certainly here the plaintiff made and pressed an application for an interlocutory injunction and the Three Judge Court ruled directly on that question by specifically denying an interlocutory injunction in its judgment.

In the case of *Query* v. *United States*, 316 U. S. 486, 489, 490, 62 S. Ct. 1122, the action was brought by the United States against the defendants as members of the South Carolina Tax Commission to enjoin the enforcement of a

state tax statute with respect to the activities of the United States Army Post Exchange. A Federal District Court of Three Judges heard the case and granted the injunction but in the decree stated that the district judge alone had jurisdiction to pass upon the case. The Circuit Court of Appeals was of the same opinion and affirmed. On Certiorari this Court reversed the ruling below saying (l. c. 1124):

> "But the complainants sought to restrain the state officers from enforcing the state statute upon the ground of the unconstitutionality of the threatened application. Not only was unconstitutionality the ground asserted by the complaints for the relief sought, but it appears the relief awarded was predicated on the same ground. Cf. *Wilentz* v. *Sovereign Camp*, 306 U. S. 573, 576, 59 S. Ct. 709, 711, 83 L. Ed. 994.
>
> * * * * * * *
>
> Here a substantial charge has been made that a state statute as applied to the complainants violates the Constitution. Under such circumstances we have held that relief in the form of an injunction can be afforded only by a three-judge court pursuant to Section 266. *Stratton* v. *St. Louis S. W. R. Co.*, 282 U. S. 10, 51 S. Ct. 8, 75 L. Ed. 135; *Ex parte Bransford*, 310 U. S. 354, 361, 60 S. Ct. 947, 951, 84 L. Ed. 1249. And this is not, like *Phillips* v. *United States*, 312 U. S. 246, 61 S. Ct. 480, 85 L. Ed. 800, a case in which the state officials threatened to engage in conduct which state law could not reasonably be construed to authorize. The complainants in this case sought interlocutory and permanent injunctions against 'the enforcement, operation, or execution' of a 'statute of a State'; they sought to restrain the action of officers 'of such State in the enforcement or execution of such statute'; and their attack was based entirely 'upon the ground of the unconstitutionality of such statute.'
>
> Since there was such complete satisfaction of the conditions which make Section 266 applicable, the

cause was a proper one for a three-judge court and appeal did not lie to the Circuit Court of Appeals."

We submit there is in this case also a complete satisfaction of all the conditions which make Sections 2281 and 2284 of Title 28 U. S. C. applicable. Our attacks on the Missouri Escheat Act is based entirely on constitutional grounds. The Court in its memorandum opinion considered and overruled such constitutional objections of plaintiff. Only a three-judge court had authority to rule such questions and this appeal is properly lodged in this Court for appellate review.

We submit the facts here are similar to those in the case of *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U. S. 310, 318, 60 S. Ct. 517, where this Court said (l. c. 521):

> "The record does not warrant a judgment of dismissal. The complaint raises constitutional questions of due process, equal protection, and violation of the obligation of contract."

THE CLAIM THAT THE MISSOURI ESCHEAT ACT OF 1941, AS APPLIED TO PLAINTIFF, IMPAIRED THE OBLIGATION OF PLAINTIFF'S CONTRACT IS SUBSTANTIAL.

While the Missouri Supreme Court had held (*Aetna Insurance Co.* v. *O'Malley*, 343 Mo. 1232, 124 S. W. 2d 1164) that the fund involved was a trust fund to pay in full all policyholders involved and attorney's fees could not be paid out of it to the detriment of the policyholders because of the provisions of the Missouri Insurance Code, that code made no provision for the disposition of any undistributable residue after all policyholders interested had been paid in full. No Missouri Court decision announced any rule of law which would prevent plaintiff being paid out of

said undistributable residue. Under the rule of law recognized in the *O'Malley case, supra,* plaintiff could have been paid out of said fund had not the Escheat Act of 1941 intervened. That Act, as construed by the Supreme Court of Missouri in the case of *Weatherby* v. *Jackson,* 358 Mo. 542, 215 S. W. 2d 742, took away from plaintiff his right to be paid out of such fund and relegated him to the legislature, a purely political body, for his pay.

In the case of *Wheeling Steel Corporation* v. *Glander,* 337 U. S. 562, 570, 69 S. Ct. 1291, this Court said (l. c. 1296):

> "The State action, which is reviewable under the Fourteenth Amendment, is the composite result of both legislation and its judicial interpretation."

The composite of the Escheat Act and its judicial interpretation by the Missouri Supreme Court took away from plaintiff his right to be paid out of this fund, or to have that matter judicially determined. He was relegated to the legislature for relief.

In the case of *W. B. Worthen Co.* v. *Kavanaugh,* 295 U. S. 56, 60, 55 S. Ct. 555, this Court said (l. c. 556):

> "To know the obligation of a contract we look to the laws in force at its making. *Sturges* v. *Crowninshield,* 4 Wheat. 122, 197, 4 L. Ed. 529; *Home Building & Loan Association* v. *Blaisdell,* 290 U. S. 398, 429, 54 S. Ct. 231, 78 L. Ed. 413, 88 A. L. R. 1481."

The obligation of contracts protected by the Constitution against impairment by the States includes the means of enforcement. *Von Hoffman* v. *Quincy,* 4 Wall. 535, 18 L. Ed. 403.

Before the enactment of the Escheat Act of 1941 plaintiff had the right to be paid out of the unreturnable resi-

due of this fund; after its enactment he had left only a prayer to the legislature. This makes plaintiff's remedy a mere shadow. This further language of this Court in the *Kavanaugh case, supra*, is appropriate (295 U. S. l. c. 62, 55 S. Ct. l. c. 557):

> "A state is free to regulate the procedure in its courts even with reference to contracts already made (*Bronson* v. *Kinzie*, 1 How. 311, 11 L. Ed. 143), and moderate extensions of the time for pleading or for trial will ordinarily fall within the power so reserved. A different situation is presented when extensions are so piled up as to make the remedy a shadow (Citing cases). What controls our judgment at such times is the underlying reality rather than the form of label. The changes of remedy now challenged as invalid are to be viewed in combination, with the cumulative significance that each imparts to all. So viewed they are seen to be an oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral security."

Looking to the "underlying reality" here we see the obligation of plaintiff's contract has been so impaired that the remedy left him is a mere shadow.

In the case of *Faitoute Iron & Steel Co.* v. *City of Asbury Park, N. J.*, 316 U. S. 502, 514, 62 S. Ct. 1129, this Court said (l. c. 1135):

> " 'The question whether the remedy on this contract was impaired materially is affected not only by the precarious character of the plaintiff's right, but by considerations of fact—of what the remedy amounted to in practice.' *Pittsburgh Steel Co.* v. *Baltimore Eq. Soc.*, 226 U. S. 455, 459, 33 S. Ct. 167, 168, 57 L. Ed. 297. This was said of the claim of a creditor of a private corporation. How much more pertinent is it to claims of these appellants against the municipality of As-

bury Park in the circumstances before us. To say that the right of the Asbury Park bondholders in 1935 was a precarious character is pure understatement. And we have already seen how empty was the remedy with which to enforce the right."

In this case it is apparent how empty is the remedy left plaintiff to address a prayer to the legislature which has repeatedly turned a deaf ear to his supplications. We believe enough has been said to demonstrate that the obligation of plaintiff's contract has been impaired (in fact destroyed as a practical matter) in violation of his constitutional rights. Certainly enough has been said to show a fairly debatable question has been raised and the federal question is therefore substantial.

We believe the three-judge court was clearly in error in holding it was bound and foreclosed by the state court decisions.

In the case of *Atlantic Coast Line R. Co.* v. *Phillips*, 332 U. S. 168, 170, 67 S. Ct. 1584, this Court said (l. c. 1585):

> "A claim that a State statute impairs the obligation of contract is an appeal to the United States Constitution, and cannot be foreclosed by a State court's determination whether there was a contract or what was its obligations."

In the case of *Angel* v. *Bullington*, 330 U. S. 183, 189, 67 S. Ct. 657, this Court said (l. c. 660):

> "But whether claims are based on a federal right or are of merely local concern is itself a federal question on which this Court, and not the Supreme Court of North Carolina, has the last say. That Court could not put a federal claim aside, as though it were not in litigation, by the talismanic word 'jurisdiction.' When

an asserted federal right is denied, the sufficiency of the grounds of denial is for this Court to decide. *Titus* v. *Wallick*, 306 U. S. 282, 291, 59 S. Ct. 557, 562, 83 L. Ed. 653."

In the case of *Larson* v. *South Dakota*, 278 U. S. 429, 433, 49 S. Ct. 196, it is stated (l. c. 197):

> "The petitioner relies on the contract clause of the federal constitution, and is not prevented from invoking from this court an independent consideration of what the contract means, and whether by a proper construction, the building of a bridge impairs its obligation."

We asked that independent consideration of the three-judge court but it was denied as that court considered the state court decisions were controlling. We were therefore denied that independent consideration by the three-judge court to which we were entitled.

For other cases holding state court decisions not controlling where federal rights are claimed to have been denied see: *Coombes* v. *Getz*, 285 U. S. 434, 436, 52 S. Ct. 435, 436; *Irving Trust Co.* v. *Day*, 314 U. S. 556, 561, 562, 62 S. Ct. 398, 401; *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 659, 65 S. Ct. 870, 874; *United States Mortgage Co.* v. *Matthews*, 293 U. S. 232, 236, 55 S. Ct. 168, 170.

We submit it is too clear for debate that there is here a substantial question of plaintiff's right to enforce his contract with the State of Missouri being taken away or materially lessened by the Escheat Act of 1941, as applied by the Supreme Court of Missouri to this plaintiff. We submit the three-judge court therefore had jurisdiction and this Court now has jurisdiction on this appeal.

THE CLAIM THAT THE MISSOURI ESCHEAT ACT OF 1941, AS APPLIED TO PLAINTIFF, DENIES HIM THE EQUAL PROTECTION OF THE LAW IS SUBSTANTIAL.

Weatherby, Cook and Lauf, lawyers like plaintiff, who served the State of Missouri under similar contracts were paid out of this fund substantial sums to apply on their fees (Complaint, Pars. 22, 23; pp. 18, 19). The Complaint alleges they received in excess of $140,000.00 (Complaint, Pars. 22, 23; pp. 18, 19).

After the decision in the Weatherby case, the State of Missouri brought suits against such lawyers to recover such money so paid out of such fund. In each of the cases the State settled with the defendant lawyers by allowing them to keep all the money so paid upon their releasing all claims for further compensation from the State of Missouri for their services rendered in the insurance litigation (Complaint, Pars. 25, 26; pp. 20, 21).

Plaintiff was paid nothing in advance and has never received any compensation while such other attorneys have been paid such very substantial sums out of this very fund.

In the case of *First Nat. Bank of Shreveport* v. *Louisiana Tax Com'n*, 289 U. S. 60, 65, 53 S. Ct. 511, the Court said (l. c. 513):

> "For plaintiffs are entitled to the relief against statutes alleged to be unconstitutional only if the statute as applied discriminates injuriously against them. *Supervisors of Albany County* v. *Stanley*, 105 U. S. 305, 314, 26 L. Ed. 1044."

Certainly the statute here as applied discriminates injuriously against plaintiff and he is enjtitled to relief on that ground here.

In the case of *Watson* v. *Buck*, 313 U. S. 387, 402, 61 S. Ct. 962, this Court said (l. c. 967):

> "A law which is constitutional as applied in one manner may still contravene the constitution as applied in another."

As applied here the Escheat Act allows the three other lawyers to retain large sums paid to them out of this fund while denying to plaintiff even one cent out of said fund.

The action of the legislature is enacting the Escheat Act of 1941, the ruling of the Supreme Court of Missouri, applying it so as to discriminate against plaintiff and deny his rights, and the act of the Attorney General in settling with the three other lawyers and permitting them to retain large sums of money paid out of said fund while denying plaintiff any rights in said fund is state action within the prohibitions of the Fourteenth Amendment to the Constitution of the United States. *Shelley* v. *Kraemer*, 334 U. S. 1, 14-18, 68 S. Ct. 836, 842-846.

The only difference in the positions of plaintiff and the other three lawyers is that they were paid out of this fund certain large sums on account of fees for such services while plaintiff was not so paid. We submit that it is not a valid distinction. Would anyone say that a legislative classification based on such difference would be upheld as based on a reasonable distinction and so be held valid? To ask that question is to answer it.

Plaintiff has not here received equal treatment to other persons under similar circumstances and has been

denied equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States. *Frost* v. *Corporation Commission of State of Oklahoma*, 278 U. S. 515, 49 S. Ct. 235; *Louisville Gas and Electric Co.* v. *Coleman*, 277 U. S. 32, 48 S. Ct. 423; *Power Manufacturing Corp.* v. *Saunders*, 274 U. S. 490, 47 S. Ct. 678.

We submit there is here clear discrimination against plaintiff in violation of his Constitutional rights; that the issue is substantial and confers jurisdiction on this Court.

THE CLAIM THAT THE MISSOURI ESCHEAT ACT OF 1941, AS APPLIED TO PLAINTIFF, DEPRIVED HIM OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW IS SUBSTANTIAL.

The claim of plaintiff for compensation for six years of service is an equitable right, and a contract right and is regarded as "property" within the meaning of the term as used in the due process clause of the Fourteenth Amendment to the Constitution of the United States. *Lynch* v. *United States*, 292 U. S. 571, 54 S. Ct. 840; *Moragne* v. *United States*, 16 F. Supp. 1009 (D. C. W. D. S. C., 1936); *Boston Elevated Ry. Co.* v. *Commonwealth*, 39 N. E. 2d 87, 310 Mass. 528.

The action depriving plaintiff of his right to be compensated out of this fund was state action not in the exercise of the police power for the necessary protection of some vital interest of the public, and amounts to the deprivation of plaintiff's property without due process of law contrary to the guarantees of the Fourteenth Amendment.

In the case of *Weatherby* v. *Jackson*, 358 Mo. 542, 215 S. W. 2d 742, the Court said (l. c. 745):

> "We must again, as we have before, say to these plaintiffs, your claims must be presented to the legislature for consideration."

To relegate the valid claim of this plaintiff against the unreturnable residue of this fund to the uncertainties of legislative consideration, beset as the whole matter has been with partisan politics, is to destroy the right on which the claim is based and make the claimant a mere supplicant before such political body, without the right to a hearing and without the benefit of process. The complete lack of value in such phantom remedy is clearly demonstrated by the repeated rebuffs plaintiff has received from the legislature heretofore in this matter.

Here the State of Missouri has denied plaintiff an initial hearing by either an administrative agency or a court and has denied him all rights in the appellate courts.

Ordinarily an escheat act requires the court to hear anyone who may appear to the suit and claim an interest in this fund. Here plaintiff is precluded from maintaining any form of action looking to the establishment of his claim against this fund. In denying him that right we believe it contravenes his Constitutional rights. *Security Sav. Bank* v. *California*, 263 U. S. 282, 44 S. Ct. 108.

In *Hall* v. *Wisconsin*, 103 U. S. 5, 10, the plaintiff was employed as a commissioner to make a mineral survey of the state. That case is strikingly like this. Plaintiff there applied to the legislature for relief to no avail as the plaintiff did here. The syllabus there fairly summarizes the holding of the Court. It is as follows:

> "A contract between a state and a party, whereby he is to perform certain duties for a specific period at a stipulated compensation, is within the protection of the constitution; and on his executing it he is entitled

to that compensation, although before the expiration of the period the state repealed the statute pursuant to which the contract was made."

The State of Missouri, by its construction and application of the provisions of its Insurance Code, Sections 5788, 5789, 5795-5798, 5985, R. S. Mo., 1939, and Section 5985a of the 1941 Session Laws, Page 396 (the Escheat Act of 1941), has denied to said claimant all right to be paid for his services in accordance with the express provision of his valid contract of employment. It has denied to him all right to be paid in accordance with recognized equitable doctrine for the impressment of a lien upon the fund created by his services, more than $2,000,000.00 of which fund is unreturnable to the policyholders for whose benefit it was created and is now escheated to the State. By its legislative action the State of Missouri has denied claimant's petition for an appropriation for said payment as suggested by its highest court.

Such complete and final denial to said claimant of all right to be compensated for his valuable services, solicited, contracted for, and accepted by the State, at the same time that the State reaches out and takes the unreturnable residue of more than $2,000,000.00 of the fund created by said services, in final destruction of said claimant's contract right, property right, and equitable claim, is so far unreasonable, arbitrary and capricious as to constitute a clear violation of the due process of law clause of the Fourteenth Amendment to the Constitution of the United States.

While the transfer of this fund to the general revenue fund of the state of Missouri is some impediment to plaintiff in the collection of his fee it is not insurmountable and the issues here are still live issues.

In the case of *United States* v. *Klein*, 303 U. S. 276, 58 S. Ct. 536, this Court held the State of Pennsylvania had the authority to escheat moneys deposited in the registry of the federal court and later covered into the treasury of the United States. See also *National Refining Co.* v. *McDowell*, (Mo. Sup.) 201 S. W. 2d 342, 349, on this point.

In the leading case of *Button* v. *Anderson*, 112 Vt. 531, 28 Atl. 2d 404, 143 A. L. R. 195, the Court allowed the recovery of attorney's fees under similar circumstances out of money in the state treasury without an appropriation from the legislature on the theory it was not the state's money and did not belong in the state treasury. We believe that is the situation here.

For all the reasons set forth above we respectfully submit that there are substantial federal questions presented in this case; that such questions were ruled by the three-judge court; that the three-judge court had jurisdiction and this Court now has jurisdiction of this appeal and plaintiff-appellant is entitled to a hearing on the merits.

Respectfully submitted,

WALTER A. RAYMOND,
WILLIAM H. BECKER,
ROBERT L. HOWARD,
Attorneys for Plaintiff-Appellant.

APPENDIX A.

379.395. Unclaimed Money Shall Escheat—Procedure.

1. The superintendent of insurance, after the final determination of any action to review his orders and directions as provided in Section 379.390, shall immediately use all proper diligence to return to the persons or companies entitled thereto, all funds held by him during the pendency of such action or review.

2. If, after said superintendent of insurance has diligently used such methods and means as he shall consider reasonable to refund said funds, there shall remain in his hands any money, the owner of which being unknown to said superintendent, or if known, said superintendent, cannot locate such owner, in each and every such instance said money shall escheat and vest in the state of Missouri, and it shall be the duty of said superintendent of insurance to pay the same to the state treasurer taking duplicate receipts therefor, one of which he shall file with the state auditor who shall charge the state treasurer therewith, and such money shall be credited to a fund to be designated as "escheat"; provided, however, that within five years after such money has been paid into the state treasury, any person or corporation who appears and claims the same may file his petition in the circuit court of Cole County, Missouri, stating the nature of his claim and praying that such money be paid to him, a copy of which petition shall be served upon the superintendent of insurance who shall file an answer to the same.

3. The court shall proceed to examine said claim and the allegations and proof, and if it find that such person is entitled to any money so paid into the state treasury,

it shall order the state treasurer for the amount of said claim, but without interest or costs; a certified copy of which order shall be a sufficient voucher for issuing such warrant; provided further, that either party may appeal from the decision of said court in the same manner as provided by law in other civil actions; and provided further, that all moneys paid into the state treasury under the provisions of this section after remaining therein unclaimed for five years shall escheat and vest absolutely in the state and all persons or corporations shall be forever barred and precluded from setting up title or claim to any of said funds, and same shall be on the order of the board of funds commissioners transferred to the general revenue fund of the state; and provided further, that the provisions of this section shall apply to all funds now in the hands of the supt. or insurance or hereafter paid to him as a result of any rate litigation, whether same was accumulated in accordance with the provisions of Sections 379.315 to 379.415 or otherwise (L., 1941, p. 396, Sec. 5985a).

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

No. 422

JOHN T. BARKER, Plaintiff,

v.

C. LAWRENCE LEGGETT, Superintendent of the Insurance Department of the State of Missouri, et al., Defendants.

Memorandum Order Denying Preliminary Interlocutory Injunction and Dismissing Action.

On three occasions, the Supreme Court of the State of Missouri, construing statutes of that State, has ruled that plaintiff, his associates, and others who were claiming attorneys' fees and expenses to be a lien upon, and payable out of, the insurance restitution fund referred to in the complaint, had no lien thereon and were not entitled to be paid out of such fund.

In *Aetna Insurance Co.* v. *O'Malley, (1938) 124 S. W. (2d) 1164*, that Court specifically rejected the claim of plaintiff that he was entitled to a lien on said fund for attorney's fees, on the ground that the general equity principles and terms of his contract of employment, which plaintiff there asserted entitled him to share in the fund, had been "superseded" by statute, in effect when he was employed, which directed that the fund be "turned over to the policyholders pro-rata," and that, as a consequence

of said statute, that portion of plaintiff's contract of employment that provided for payment of attorney's fees from said fund was illegal.

Subsequent to the ruling so made, the Legislature of the State of Missouri enacted the escheat statute referred to in the complaint. (*Sec. 379.395, R. S., Mo., 1949.*) After enactment thereof, which provided that the residue of the insurance restitution fund escheat to the State, after payment of claims, plaintiff again sought to have attorney's fees allowed and paid to him out of said fund, as a "claimant" under that statute. The Supreme Court of Missouri held, that said fund belonging to "policyholders" under the Insurance Code of Missouri, (*Sec. 379.390, R. S., Mo., 1949*) only policyholders were proper claimants thereunder, and denied the claim of plaintiff and his associates, so made. *Weatherby* v. *Jackson* (*1948*) *215 S. W. (2d) 742.*

The gist of the instant action is that the escheat statute (*Escheat Act of 1941, Sec. 5985a, Laws of Missouri, 1941, page 397; now 379.395, R. S., Mo., 1949*) as enacted by the Legislature of Missouri, and as construed by the Supreme Court of that State in *Weatherby's case, supra*, violates plaintiff's contract and property rights under *Article 1, Sec. 10, par. 1, of the Federal Constitution*, and that he has also been denied rights under the equal protection clause of the *Fourteenth Amendment* thereto, all as more fully set forth in the complaint. The theory of recovery asserted by plaintiff is stated by him as follows:

> "During the time when it was undetermined whether all, or how much, of the fund could be returned to policyholders, this *pro-rata* provision of the statute as interpreted by the Missouri Supreme Court, prevented the carrying out of that part of the valid contract which called for payment of reasonable attorney's fees, as fixed by the Court, out of the fund.

> When it became clear that there would be a large sum returnable because policyholders with rightful claims thereto could not be found, then as to this undistributable residue, this obstacle to the carrying out of that part of the valid employment contract calling for payment of said reasonable attorney's fees * * * no longer existed. In like manner, the basis for denying application of the admitted equitable principles ceased to exist. At that point, the attorneys, parties to admittedly valid contracts calling for payment for reasonable attorneys' fees out of the fund, became entitled under that contract, to have their claims allowed out of this undistributable residue to which no policyholders could be found with a valid claim."
>
> (Plff's Brief on Motion to Dismiss, p. 8.)

The denial to plaintiff of the alleged right to have attorney's fees due and owing to him to be now paid out of the "undistributable portion of the insurance restitution fund," is the sole basis for the constitutional propositions here raised by him. That such contention does not present a substantial constitutional question that would authorize this Court to grant the relief here prayed, is manifest to us from the following considerations.

(a) The 1938 decision of the Supreme Court of Missouri (*124 S. W. (2d) 1164*) which held that that portion of his contract of employment by the Superintendent of the Insurance Department of the State of Missouri, providing that attorney's fees to be paid plaintiff should be fixed by the Court, and paid out of the fund, was illegal, in violation of a statute of the State; and, that any equitable right asserted by plaintiff, to be paid from the fund, was superseded by statute, is not, and cannot here be challenged by plaintiff. That decision is binding upon us.

(b) It is there also ruled that said fund belonged to policyholders and should be returned to them unimpaired by any claim of plaintiff and his associates.

(c) The enactment of the Escheat Statute, *supra*, did not fracture the title of the policyholders to the fund in question so found to be resident in them by the Supreme Court of Missouri, so as to make the State of Missouri a new direct beneficiary of the undistributable portion thereof, distinct from the policyholders.

(d) When the State takes property by escheat, the State's position is like that of an ultimate distributee, in default of other statutory distributees. *State* v. *Phoenix Sav. Bank & Tr. Co. (Ariz.) 132 P. (2d) 637, 639; State* v. *Standard Oil Co. (N. J.) 74 A. (2d) 565, 572.* Mr. Justice Cardozo once said: "The state as the ultimate owner is in effect the ultimate heir." *In re Melrose Ave. (N. Y.) 136 N. E. 235, 236.* The United States Supreme Court has distinctly held that the right of escheat is a right of succession, rather than an independent claim to the property escheated. *Christianson* v. *King County, 239 U. S. 356, 370.* The result of that is this: "The State's right is purely derivative; it takes only the interest of the unknown or absentee owner." *(Standard Oil case, supra, 74 A. (2d) 565, 573.)* Consequently, that which escheats to the State of Missouri under the statute here challenged by plaintiff is the title of policyholders to the fund in question, and not an independent taking or vesting of the fund in the State, so as to make the undistributable portion of the fund one directly recovered by plaintiff for the State, under his contract of employment, as plaintiff now contends.

(e) When the fund escheats to the State, the State "is thereby invested with all the rights, privileges, priorities, and appurtenances incident thereto and with which it was held by the persons from whom it escheated." *19 Am. Jur., p. 409.* The fund being held for policyholders, free and clear of any lien in favor of plaintiff and his as-

sociates, the escheat thereof to the State did not create any right in plaintiff to now claim that he recovered such fund for and on behalf of the State within the ambit of his contract of employment, or any equitable principle here asserted by him. The priority of the policyholders to said fund passed to the State, unqualified and undiminished by any right that plaintiff now asserts against the fund in suit.

(f) The contention of plaintiff that he is being denied the equal protection of the law, because the State has not compelled Lauf, Cook and Weatherby to repay to the fund the various sums paid to them, but, on the contrary, has compromised litigation instituted by the State looking to that result, is without merit. In *Weatherby's case, supra,* and in *Aetna Ins. Co.* v. *O'Malley, 118 S. W. (2d) 3,* the payments so made from the fund to said parties were held to be illegal under State law by the Supreme Court of Missouri. The refusal of the State to countenance further illegal payments to be made from the fund in question cannot be held a denial of equal protection of the law. *Meyer* v. *Terr. of Hawaii, 164 F. (2d) 845, 849.*

Plaintiff's motion for a preliminary injunction is by the Court denied.

Defendant's motion to dismiss this action is by the Court sustained.

(Signed) J. C. Collet
Judge, United States Court of Appeals,
Eighth Circuit

(Signed) R. M. Duncan
Judge, United States District Court

(Signed) Albert A. Ridge
Judge, United States District Court

(Stamped Filed Sept. 5, 1951.)

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Supreme Court of the United States

OCTOBER TERM, 1951.

No. 427.

JOHN T. BARKER, APPELLANT,

VS.

C. LAWRENCE LEGGETT, SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF THE STATE OF MISSOURI ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI.

MOTION FOR REHEARING AND FOR AN ORDER VACATING ORDER OF DISMISSAL AND FOR REINSTATEMENT OF APPEAL.

WALTER A. RAYMOND,
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Supreme Court of the United States

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MOTION FOR REHEARING AND FOR AN ORDER VACATING ORDER OF DISMISSAL AND FOR REINSTATEMENT OF APPEAL.

Comes now the Appellant, John T. Barker, and moves the Court for a rehearing and for an order vacating the *per curiam* dismissal of the appeal herein and for an order reinstating this cause upon the docket of this Court, and for grounds therefor states that appellant's counsel ap-

parently has failed to clearly present the basis of jurisdiction of this Court, namely:

1. This Court inadvertently overlooked the fact that there are substantial Federal questions involved in the review of the order of the judgment of the three judge Court below denying an injunction against the execution of the State law of Missouri, to-wit; Section 379.395, R. S. Mo., 1949, namely:

(a) In this case impairment of the obligation of contract by said Statute was asserted. The District Court (Opinion, Paragraph a) held that the decision of the Supreme Court of Missouri (*Aetna Ins. Co.* v. *O'Malley*, 343 Mo. 1232, 124 S. W. 2d 1164), holding a portion of plaintiff's contract of employment to be invalid, was binding, and could not be re-examined by the Federal Court. Said Paragraph (a) of the decree below reads as follows:

> "(a) The 1938 decision of the Supreme Court of Missouri (124 S. W. 2d 1164), which held that that portion of his contract of employment by the Superintendent of the Insurance Department of the State of Missouri, providing that attorney's fees to be paid plaintiff should be fixed by the Court, and paid out of the fund, was illegal, in violation of a statute of the State; and, that any equitable right asserted by plaintiff, to be paid from the fund, was superseded by statute, is not, and cannot here be challenged by plaintiff. *That decision is binding upon us*" (Emphasis ours).

It refused to construe appellant's contractual rights under the Federal Constitution forbidding any State to make any law impairing the obligation of contracts or the right to contract. Upon that basis the State Statute challenged was not reviewed for conformity with Federal Constitutional requirements. The Statute challenged was

an escheat law which appropriated for the use of the State funds in which appellant claimed to have a contractual interest, an equitable interest and an attorney's lien for services rendered in this and other Courts. Both the decision of the Supreme Court of Missouri and the Missouri Statute came into being, long after plaintiff had rendered service to the State under contract and the State had accepted the same.

A substantial Federal question namely, whether or not the decision of the Supreme Court of Missouri rendered after plaintiff had completed his labor was binding and conclusive upon the Federal Courts, was presented. It has long been held that, in construing a contract in light of the Federal Constitution and particularly the clause forbidding impairment of contract the Federal Court can and must construe the obligation of the contract anew for itself.

In the case of *Larson* v. *South Dakota*, 278 U. S. 429, 433, this Court stated:

> "The petitioner relies on the contract clause of the Federal Constitution, and is not prevented from invoking from this Court an independent consideration of what the contract means, and whether by a proper construction, the building of a bridge impairs its obligation."

In the case of *Irving Trust Co.* v. *Day*, 314 U. S. 556, 561, this Court stated:

> "When this Court is asked to invalidate a state statute upon the ground that it impairs the obligation of a contract, the existence of the contract and the nature and extent of its obligation become federal questions for the purposes of determining whether they are within the scope and meaning of the Federal Constitution, and for such purposes finality cannot be accorded the view of a state court."

(b) The complaint asserted that the appellant was deprived of his property without due process of law by the enactment and execution of the State Statute involved (Section 379.395, R. S. Mo., 1949). The State of Missouri, after contracting for plaintiff's services through its Governor, Superintendent of Insurance Department and the Attorney General, and after accepting appellant's services and the fruits thereof, by statute (Sec. 379.395, R. S. Mo., 1949) appropriated to its own use the funds in which the plaintiff claimed an equitable and legal right and lien for services rendered in creating and capturing said funds. The State of Missouri concedes the validity of plaintiff's employment but has denied him any remedy in the State Courts except petition to the Legislature for payment for his services, which upon several applications has proven futile. Plaintiff contends that by State action (Statute and/or judicial decision) a State cannot consistently with due process reduce an independent contractor to an employee after hiring and rendition of service. Such a course denies the appellant due process of law and impairs the obligation of contract, and the right to contract. This Court in practically an identical situation, not only found the question of sufficient substance to hear an appeal, but held the State action unconstitutional. *Hall* v. *Wisconsin*, 103 U. S. 5, 8, 10, wherein this Court said:

> "In *United States* v. *Maurice* (2 Brock 96), Mr. Chief Justice Marshall said: 'Although an office is an employment, it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to perform a service without becoming an officer. * * * It would be a novel and startling doctrine to all these classes of persons that the government might discard them at pleasure, because their respective employments were public offices, and hence without the protection of contract rights."

(2) Direct appeal to this Court was based upon the Federal Statutes concerning direct appeal from a decree granting or refusing an injunction to enjoin enforcement of a State Statute (Title 28, U. S. C. A., Secs. 1253 and 2101(b)). Plaintiff sought below temporary and permanent injunctions restraining the operation and execution of the Missouri Statute (379.395, R. S. Mo., 1949) which appropriated to the use of the State the funds of $2,150,000.00 which plaintiff had recaptured by his service in this and other Courts under contract to be paid therefrom. The execution of the contract is admitted by the State of Missouri. The appellant, a member of the bar of this Court, rendered admittedly valuable services in the recapturing of said fund under the contract admittedly made with the State of Missouri, and the chief officers thereof. Much of this service was performed in the presence of this Court. The State of Missouri has admitted the validity of plaintiff's employment but has repudiated the solemn agreement of its Governor, Attorney General and Superintendent of the Insurance Department to pay the plaintiff a contingent fee out of the funds recaptured. This has been accomplished by a decision of its Supreme Court (*Aetna Ins. Co.* v. *O'Malley*, 343 Mo. 1232, 124 S. W. 2d 1164, followed by the enactment of a Statute (Sec. 379.395, R. S. Mo., 1949) appropriating to the State's own use all the funds free of plaintiff's claim which said Statute further denies to the plaintiff any hearing before any judicial or administrative body. For the first time in the history of the United States it has been held that a party to an admittedly valid contract of employment can be denied a judicial hearing and sent to a political body for redress for breach of contract. This Court refused to permit the State of Wisconsin to accomplish a similar wrong in *Hall* v. *Wisconsin*, 103 U. S. 5. Now, unless the dismissal of the appeal herein is set aside the appellant will be denied the

protection of the Constitution and of the rule announced in the *Hall* case without even being afforded a hearing in this Court.

It is submitted by the appellant that his claims of violation of his constitutional rights by the execution of the Missouri Statute involved, predicated on wrongful State decisions, are sufficiently serious to merit a hearing of his appeal, and we therefore respectfully ask that the order of dismissal herein be vacated, the appeal reinstated and a rehearing granted.

Respectfully submitted,

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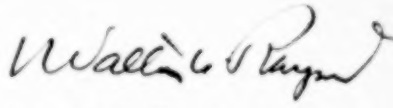
Attorneys for Appellant.

CERTIFICATE OF COUNSEL.

I, Walter A. Raymond, counsel for Appellant do hereby certify that the foregoing motion is presented in good faith and not for delay.



WALTER A. RAYMOND.

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Supreme Court of the United States

OCTOBER TERM, 1951.

No. 427.

JOHN T. BARKER, APPELLANT,

VS.

C. LAWRENCE LEGGETT, SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF THE STATE OF MISSOURI ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI.

MOTION TO MODIFY AND SUPPLEMENT PER CURIAM ORDER OF JANUARY 2, 1952, TO SAVE APPELLANT HIS PROPER REMEDY OF APPEAL TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Supreme Court of the United States

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI.

MOTION TO MODIFY AND SUPPLEMENT PER CURIAM ORDER OF JANUARY 2, 1952, TO SAVE APPELLANT HIS PROPER REMEDY OF APPEAL TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Comes now the Appellant, John T. Barker, and moves the Court (if a rehearing is not granted) to modify and supplement the *Per Curiam* order of January 2nd, 1952, to read substantially as follows:

> "*Per Curiam*: The appeal is dismissed for want of a substantial Federal question involving the validity of the state statute, the execution of which was sought to be enjoined. The complaint alleged diversity of citizenship and a controversy involving more than the requisite jurisdictional amount. The complaint sought declaratory and coercive relief upon grounds not involving the enforcement, execution or operation of the

state statute. Since the appellant mistakenly appealed to this Court, and since the time for giving notice to appeal to the Court of Appeals has expired, the decree of the District Court will be ordered vacated in order that the Appellant may be saved his remedy by appeal to the Court of Appeals. We therefore vacate the decree of the District Court and remand the cause to the Court which heard the case so that it may enter a fresh decree from which the Appellant may, if he wishes, effect a timely appeal to the Court of Appeals (*Phillips* v. *United States*, 312 U. S. 246, 254, 61 S. Ct. 480, 484, 85 L. Ed. 800; *Walling* v. *James V. Reuter*, 321 U. S. 671, 677, 64 S. Ct. 826, 829, 88 L. Ed. 1006).

"Decree vacated."

And for grounds for said motion, Appellant states:

1. The Court in making its Order of Dismissal on January 2nd, 1952, inadvertently (probably due to failure of Appellant's counsel to make their position clear) failed to consider the fact that the amended complaint, dismissed by the District Court, sought relief other than an injunction against the execution, enforcement and operation of the state statute involved, and stated a case of jurisdiction upon diversity of citizenship and the requisite jurisdictional amount. The amended complaint (Par. 2) stated that the Appellant-Plaintiff was a citizen of the District of Columbia, and (Par. 8) that the defendants and each of them were citizens of the State of Missouri. The amended complaint (Par. 9) alleged that the amount in controversy was $275,-100.00, exclusive of interest and costs.

2. The amended complaint further contained this allegation (Par. 2) concerning the basis of jurisdiction in the Court below:

"Jurisdiction to hear, try and determine this cause, and to award both coercive and declaratory relief, or either, exists because of the denial of the rights of the plaintiff protected by the federal Constitution *in addi-*

tion to, and independently of, jurisdiction existing because of diversity of citizenship" (Emphasis added).

3. The amended complaint, in addition to the prayer for injunction against execution of the state statute involved, prayed for a judgment and declaration of his rights against the defendants and the funds involved and for general equitable relief (Amended Complaint, Prayer, Pars. J3, J4, J5, J6, J8).

4. The judgment of dismissal was entered by the District Court on September 5, 1951. The time for taking a proper and timely appeal from that judgment has expired. By mistakenly appealing directly to this Court in good faith, the Appellant has been deprived of his proper remedy of appeal to the Court of Appeals for the Eighth Circuit.

5. Under the practice of this Court, when this Court is without jurisdiction to decide an appeal which should have been prosecuted to another Court, it may, and it is the established practice to vacate the judgment below and remand the cause in order to enable the Court below to enter a new judgment from which a proper appeal may be taken (*Phillips* v. *U. S.*, 312 U. S. 246, 254, 61 S. Ct. 480, 484, 85 L. Ed. 800, involving, as here, an appeal mistakenly taken to this Court from a decree rendered by three judges; *Walling* v. *James V. Reuter*, 321 U. S. 671, 677, 64 S. Ct. 826, 829, 88 L. Ed. 1006).

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Attorneys for Appellant.

SUGGESTIONS IN SUPPORT OF MOTION.

Unless this Court modifies its *Per Curiam* order of January 2nd, 1952, the Appellant herein, a member of the Bar of this Court, will lose his right to review of the decree of the District Court simply because he mistakenly and in good faith appealed directly to this Court. Heretofore this Court has taken pains in cases of this character to make an order which would save appellants in such cases their proper remedies.

The *Per Curiam* order of January 2nd of this case reads as follows:

> "*Per Curiam*: The appeal is dismissed for the want of a substantial federal question."

Appellant has set forth in this motion what he conceives to be the proper order in this case, assuming that this Court does not have jurisdiction to hear his appeal.

In the last controlling decision of this Court on the question, Mr. Chief Justice Stone summarized the practice in cases of this kind:

> "It is a familiar practice of this Court that where for any reason the Court may not properly proceed with a case brought to it on appeal, or where for any reason it is without power to proceed with the appeal, it may nevertheless, in the exercise of its supervisory appellate power, make such disposition of the case as justice requires. When events subsequent to an appeal may affect the correctness of the judgment appealed from, this Court may vacate the judgment and remand the cause for further proceedings. *State of Missouri ex rel. Wabash R. Co.* v. *Public Service Comm.*, 273 U. S. 126, 131, 47 S. Ct. 311, 313, 71 L. Ed. 575; *Patterson* v. *State of Alabama*, 294 U. S. 600, 607, 55 S. Ct. 575, 578, 79 L. Ed. 1082 and cases cited; *Villa* v. *Van Schaick*, 299 U. S. 152, 155, 156, 57 S. Ct. 128,

129, 81 L. Ed. 91. *When it is without jurisdiction to decide an appeal which should have been prosecuted to another court, it may vacate the judgment and remand the cause in order to enable the court below to enter a new judgment from which a proper appeal may be taken. Gully* v. *Interstate Natural Gas Co.,* 292 U. S. 16, 54 S. Ct. 565, 78 L. Ed. 1088; *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.,* 292 U. S. 386, 392, 54 S. Ct. 732, 735, 78 L. Ed. 1318; *Jameson & Co.* v. *Morgenthau,* 307 U. S. 171, 174, 59 S. Ct. 804, 805, 83 L. Ed. 1189; *Phillips* v. *United States,* 312 U. S. 246, 254, 61 S. Ct. 480, 484, 85 L. Ed. 800" (*Walling* v. *James V. Reuter,* 321 U. S. 671, 677, 64 S. Ct. 826, 829, 88 L. Ed. 1006) (Emphasis added).

This rule has been applied in cases of this character where the appeal was mistakenly taken directly to this Court from a decree rendered by three judges. *Phillips* v. *United States,* 312 U. S. 246, 254, 61 S. Ct. 480, 484, 85 L. Ed. 800. In that case, Mr. Justice Frankfurter stated:

> "Had a timely appeal been taken to the circuit court of appeals the decree below could have been reviewed there, though rendered by three judges. *Healy* v. *Ratta,* 289 U. S. 701, 53 S. Ct. 522, 77 L. Ed. 1459; *Id.,* 1 Cir., 67 F. 2d 554; *Id.,* 292 U. S. 263, 54 S. Ct. 700, 78 L. Ed. 1248. While this Court cannot hear the merits, it will, where the question of jurisdiction was not obviously settled by prior decisions, enforce the limitations of Sec. 266 by an order framed to save appellants their proper remedies *Oklahoma Gas Co.* v. *Packing Co.,* 292 U. S. 386, 392, 54 S. Ct. 732, 734, 78 L. E. 1318. We therefore vacate the decree and remand the cause to the court which heard the case so that it may enter a fresh decree from which appellants may, if they wish, perfect a timely appeal to the circuit court of appeals.
>
> "Decree vacated."

The order proposed in this motion to modify follows the order as framed in the opinion of Mr. Justice Frankfurter and the Phillips case.

In addition to injunctive relief involving the enforcibility of the state statute attacked on Federal grounds, the amended complaint based jurisdiction on diversity of citizenship and sought coercive and declaratory relief and sought general equitable relief upon non-federal as well as federal grounds. The District Court dismissed the complaint upon motion of the defendants. For purposes of the motion and the determination of this motion, the averments of the complaint are taken as true. In fact, the record shows that counsel for the defendants agree in open court upon hearing of the motion to dismiss and the applications for injunction, that the averments of the amended complaint could be taken as true (Tr. 18 and 25).

It is submitted that, in the interest of justice, and in keeping with the established practice of this Court, the decree below should be vacated so that it may be re-entered and the Appellant may take a timely appeal therefrom to the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

I, Walter A. Raymond, counsel for Appellant do hereby certify that the foregoing motion is presented in good faith and not for delay.

WALTER A. RAYMOND.

[redacted]

FILED

JAN 29 195[redacted]

[redacted]

Supreme Court of the United States

OCTOBER TERM, 195[redacted]

NO. 457

JOHN T. BARKER, APPELLANT,

VS.

C. LAWRENCE LEGGETT, SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF THE STATE OF MISSOURI, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

SUGGESTIONS IN OPPOSITION TO MOTION TO MODIFY AND SUPPLEMENT THE CERTAIN ORDER OF JANUARY 2, 195[redacted]

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when it should have been appealed to the Circuit Court of Appeals, this court may vacate the judgment of the District Court and remand the cause in order that the appellant may have his case reviewed in the proper appellate court. However, the appeal in this case was properly taken to this court by reason of the fact that it was an appeal from a Three-Judge District Court called to pass upon an application to restrain the enforcement of a state statute (Title 28, U.S.C.A., Sections 1253, 2101(b), 2281 and 2284).

In the case at bar respondents filed a motion to affirm the judgment of the court below for the reason that it is manifest the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. It is manifest that this court, therefore, dismissed the appeal because the questions in the case are so unsubstantial as not to need further argument. The wording of the per curiam order of January 2, 1952, is perhaps language ordinarily used in dismissing an appeal from a state court to this court, but undoubtedly it was the intention of the court to dismiss the appeal because the questions involved are so unsubstantial as not to need further argument. If the questions upon which the decision of the cause depend are so unsubstantial as not to need further argument, it would be useless to remand the case to the District Court, but the case should be finally disposed of by this court by dismissing the appeal or affirming the judgment of the court below.

It is, therefore, respectfully submitted that the motion to modify the per curiam order of January 2, 1952, should be overruled.

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